BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits For Wireless Telecommunications Carriers	)	WT Docket No. 98-205
Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap	)	
Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Services Spectrum Cap	)	WT Docket No. 96-59
Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

PETITION FOR RECONSIDERATION OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Petition for Reconsideration in the above captioned proceeding.[2]

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 49 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

[2] In the Matter of 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket Nos. 98-205, 96-59 and GN Docket No. 93-252, *Report and Order*, FCC 99-244 (rel. Sep. 22, 1999) ("Order").

I. INTRODUCTION AND SUMMARY

The Commission should reconsider its refusal to forbear from the 45 MHz cap at this time. Notwithstanding the Commission's pledge that it will revisit these issues in the future, forbearance is warranted now. The Commission has opted to substitute its judgment for that of the market. Given the competitive functioning of the CMRS marketplace,[3] this action is highly inappropriate.

In this case, the Commission has not met its affirmative statutory obligation to remove unnecessary regulations for CMRS carriers. The Commission's abbreviated forbearance analysis did not adequately account for the competitive nature of the CMRS industry. The Commission must, on reconsideration, forbear from the 45 MHz CMRS spectrum cap so that it can fulfill Congress' specification of a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."[4]

On reconsideration, the Commission should also correct the disparity that it has created by subjecting CMRS carriers to different standards than other communications companies. The Commission should adopt, as it has for the other industries, a forward-looking approach to regulation of the CMRS market. It is not rational for the Commission to treat conceptually similar circumstances differently. The Commission's deregulatory approach should be consistent. In keeping with Congress' preference for market forces, the Commission must adopt an approach

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[3] See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Fourth Report*, 14 FCC Rcd 10145, 10207 (1999) (noting that "the average price per minute of mobile telephone service declined over 40 percent between the end of 1995 and the end of 1998").

[4] S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess at 1 (1996).

that mirrors current reality and reasonably foreseeable developments for all services including CMRS.

While the Commission's invitation for waiver requests and its pledge to allocate additional spectrum for advanced third generation ("3G") services is noteworthy, it is not enough. By expressly inviting carriers that are spectrum-strapped to seek a waiver of the spectrum cap, the Commission acknowledged implicitly that the cap can impair a carrier's wireless strategy both domestically and globally. There is a distinct likelihood that by retaining the cap in its current form the Commission will impair the global expansion and growth of the wireless industry and, more importantly, the services available to consumers. In a sector as competitive as CMRS, any regulatory measures that may have the effect of impairing innovation should necessarily be considered suspect. CTIA respectfully submits that the goal of the Commission's regulatory process should be to favor competition by removing barriers to its development. The Commission does not further its deregulatory goals by "protecting" competition through unnecessary regulation. This is especially true when the Commission's concerns can be addressed through other less restrictive means than retention of the spectrum cap.

II. THE COMMISSION DID NOT MEET ITS AFFIRMATIVE OBLIGATION UNDER SECTION 10 BY MAKING A COMPELLING AND CONVINCING CASE THAT RETENTION OF THE 45 MHZ CAP WAS NECESSARY.

A review of the Communications Act of 1934, as amended ("Communications Act"), demonstrates Congress' clear preference for market forces to shape the development of telecommunications services. The Commission's role in this process is to promote the development of competition and advanced services that benefit all Americans.[5] Section 10 is no

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[5] See 47 U.S.C. § 151 (Commission should promote the availability of a rapid, efficient, nationwide, and worldwide radio and wire communications service); 47 U.S.C. § 157

exception.[6] By retaining the 45 MHz CMRS spectrum cap, the Commission acts inconsistently with its obligation to take a deregulatory approach to wireless services and to foster competition, efficiency, advanced services, and new technologies.

In its seven paragraph discussion of CTIA's petition for forbearance,[7] the Commission did little to meet its affirmative obligation under Section 10 to prove that the spectrum cap is necessary (1) to prohibit discriminatory, unjust and unreasonable carrier behavior, (2) to protect consumers, or (3) to serve the public interest.[8] In fact, the Commission did little to address many of the matters raised by CTIA. But, perhaps more significant, the Commission failed to reconcile sufficiently its professed adherence to a deregulatory approach for CMRS services[9] with its decision to retain the spectrum cap.

(Commission should encourage new technologies); 47 U.S.C. § 251, (Commission should ensure adequate interconnection to foster competition); 47 U.S.C. § 332(c) (Commission should forbear from unnecessary regulation of the CMRS industry; the states are preempted from rate and entry regulation of CMRS); and Section 706, Telecommunications Act of 1996 (Commission shall encourage the deployment of advanced communications technology to all Americans).

6 47 U.S.C. § 160.

7 Order at ¶¶ 121-127.

8 Commissioner Powell explains that "the burden should be on us, the FCC, to re-assess and re-validate the rule under either Section 11's biennial review or Section 10's forbearance authority. . . . We must be prepared, if this is what the record evidence shows, to make a compelling and convincing case that the rule must be kept. If we cannot, or if the evidence in support of the rule is lacking, we must modify or eliminate it and rely on competitive market forces or other mechanisms, such as the antitrust laws." See 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Notice of Proposed Rule Making*, 13 FCC Rcd 25132 (1998), Separate Statement of Commissioner Michael Powell at 1 (rel. Nov. 19, 1998).

9 See Order at ¶ 23 ("there is considerable evidence that competition is steadily growing in many CMRS markets"); Remarks of William E. Kennard Chairman, Federal Communications Commission, "Competition And Deregulation: Striking The Right

In 1994, in response to Congress' directives, the Commission took a forward-looking approach to the regulation of the newly restructured CMRS industry.[10] It forbore from unnecessary Title II common carrier obligations such as the tariff filing requirements in Section 203[11] and the entry and exit application requirements of Section 214.[12] In 1995, the Commission held fast to its deregulatory principles by preempting states from continuing rate and entry regulation on the CMRS industry.[13] In response to these actions, the CMRS industry has achieved phenomenal growth in an extremely short period. Now is not the time to lose faith in the market, especially when, as noted below, the Commission still employs a forward-looking regulatory approach for other industries.

If the Commission has embraced the fact that the CMRS industry is vibrant, dynamic, and competitive, then it must remove the spectrum cap. CTIA agrees in full with the sentiments of Commissioner Powell: "I cannot imagine any other industry segment that can better laud their state of economic competition as 'meaningful.' Prices are down and falling. Innovation, churn

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Balance," United States Telecom Association Annual Convention, San Francisco, California (Oct. 18, 1999) (As Prepared for Delivery) ("You should expect that competition will bring deregulation. This has happened; it will continue to happen; and the FCC has a track record to prove it. When competition came to the long distance business, we deregulated. When competition came to the international sector, we deregulated. When competition came to wireless, we deregulated.").

10 See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, ¶¶ 173-182 (1994).

11 47 U.S.C. § 203.

12 47 U.S.C. § 214.

13 See, e.g., Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, *Report and Order*, 10 FCC Rcd 7842 (1995).

and penetration are up and still climbing. And, as this item points out, the newer PCS licensees are adding more new customers than the incumbent cellular carriers. All of this seems pretty 'meaningful' to me."[14]

III. THE COMMISSION, WITHOUT ADEQUATE EXPLANATION, IS HOLDING THE WIRELESS INDUSTRY TO A DIFFERENT STANDARD THAN IT APPLIES TO OTHER COMMUNICATIONS PROVIDERS.

Concurrent with its release of the Order, the Commission has taken a series of actions in other communications industries that are hard to square with the results in this proceeding. To illustrate, in retaining the cable horizontal ownership limit, the Commission took account of contemporaneous market circumstances by assessing the nationwide cable horizontal ownership limit based on all multiple video programming distributors ("MVPD"), including DBS carriers, rather than continuing with its cable-only "homes passed" market assessment.[15] It deliberately chose not to perpetuate a regulatory scheme that did not account for the competitive development of the industry.

Similarly, in approving the MCI WorldCom merger, the Commission took a more sophisticated approach to market analysis, recognizing that the Herfindahl-Hirschman Index ("HHI") analysis regarding the potential competitive effects of a merger was "not meant to be

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[14] Order, Separate Statement of Commissioner Michael Powell at 1.

[15] See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, *Third Report and Order*, FCC 99-289, ¶¶ 21-25 (rel. Oct. 20, 1999) (as the MVPD market continues to develop competitively, a subscriber based test will more accurately reflect market power in the programming market).

conclusive."[16] Rather, among other things, the Commission chose to look at changing market conditions that were precipitated by new market participants committed to entry so that it could have a "more complete measure of market concentration."[17] Accordingly, the Commission measured concentration such that "projected future sales of the firms . . . who have committed to enter the market" and the decreasing revenues of existing competitors were accounted for properly.[18]

By contrast, for the CMRS industry, the Commission took a more stringent view of market competition. It chose to discount the "enormous progress in the past few years" in the mobile services industry,[19] focusing instead on current subscriber levels. Here the Commission used the HHI levels to support its conclusion that "competition in CMRS markets is not fully developed."[20] It refused to factor in the "pricing trends, customer churn (switching of vendors), and the incentives associated with carriers having excess capacity" into its decision.[21] Rather, the Commission focused on the potential for reconcentration in the market if the cap were removed.[22]

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16 Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 18025, ¶ 37 (1998).

17 Id. at ¶ 38.

18 Id.

19 Order at ¶ 34.

20 Id. at ¶ 35.

21 Id. at ¶ 40.

22 Id. at ¶¶ 41-42.

It is patently inappropriate for the Commission to subject some members of the communications industry, such as CMRS carriers, to a higher competitive standard. In this case, the Commission did not properly weigh present realities and did not take a forward-looking approach to regulation; it took a regressive approach. The Commission discounted all of the competitive gains in the market because of its inordinate concern that concentration levels may increase if the cap is removed. This fear is unfounded when one considers that the Commission has the ability through its license transfer review process to deter such conduct.[23] It is also inappropriate when one factors as well the availability of antitrust measures to prevent potential anticompetitive effects. Finally, when continued regulation may impair market innovation, it is a basis for the Commission to remove, not retain, suspect regulation.

IV. GIVEN THE DISTINCT LIKELIHOOD THAT CONTINUED RETENTION OF THE 45 MHZ CMRS CAP WILL IMPAIR 3G INNOVATION, FORBEARANCE IS WARRANTED.

The Commission can no longer afford to ignore the implications of its actions in this proceeding. Its failure to forbear from the spectrum cap at this time will result in the United States falling behind Europe and Japan in the deployment of wireless 3G technologies.[24] This is important not for reasons of national pride, but because it palpably diminishes the welfare of American consumers.

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[23] 47 U.S.C. § 310(d).

[24] See "Wireless Users May Hit a Speed Bump," InfoWorld Electric, <http://www.infoworld.com/cgi-bin/displayStory.pl?991029.hnwireless.htm> (visited on Nov. 2, 1999) ("The bandwidth demands of the [high-speed wireless] services, set to start in 2001, are likely to come up against limitations on carriers' radio spectrum and slow the user experience to a crawl under heavy use.").

Given the competitive, dynamic nature of the CMRS business, the Commission's pledge to provide short term relief by entertaining waiver requests,[25] coupled with its promise to provide long term relief through additional allocations to 3G service,[26] is inadequate to a carrier trying to implement a global strategy. Moreover, it seems incongruous for a Commission that so values bright-line measures designed to promote certainty in the market[27] to introduce uncertainty through relief measures of limited "bright-line" value.

By its action, the Commission apparently assumes that a waiver request, and the showing required by such a request, imposes little or no burden upon the requesting carrier. Yet, by requiring a waiver, the Commission does little more than to add another layer of administrative bureaucracy to the license transfer process.[28] Waiver requests are unnecessarily duplicative and delay-inducing if, after the waiver request is granted, a carrier will likely then be obligated

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25 Order at ¶ 61, n.155.

26 Id. at ¶ 63. The Commission apparently presumes that any future spectrum that it allocates for 3G services is indistinguishable from an efficiency perspective from the current cellular and PCS allocations. In fact, carriers may experience greater scope efficiencies by providing these advanced services on existing PCS and cellular spectrum.

27 See id. at ¶ 49 ("We also conclude that the benefits of the bright-line spectrum cap and cellular cross-interest rules in addressing concerns about increased spectrum aggregation continue to make these approaches preferable to exclusive reliance on case-by-case review under section 310(d).") CTIA fails to understand why a "case-by-case" waiver approach is so disfavored generally if the Commission considers it sufficient for carriers in making their claim that relief from the cap will increase innovation.

28 The Commission cannot, as a matter of law, waive its statutory obligation under Section 310(d), 47 U.S.C. § 310(d), to approve license transfer and assignment requests. Therefore, by imposing a waiver requirement, the Commission tacitly imposes a two-step review process. Surely the Commission cannot argue that this provides bright-line certainty to carriers who wish obtain additional CMRS spectrum.

immediately to file a license transfer or assignment request.[29] Moreover, it is too often the case that the Commission's procedures are used by competitors as a tool to delay a carrier's entry into the market. The addition of a waiver proceeding creates a layer of process that allows for additional abuses.[30]

CTIA respectfully submits that the Commission's cost-benefit analysis in support of retaining the cap is wrong. It is not appropriate to weigh "any disincentives toward the development of new services that arguably may be caused by the current spectrum cap . . . against the disincentives toward the development of new services that would exist in a regulatory world without the current spectrum cap."[31] By this analysis, the Commission mistakenly presumes that regulation is necessary to protect the market. This is the wrong approach.

Rather, the "question regulators should ask about existing rules is not whether there is sufficient justification to *de*-regulate, but, rather where there is continuing justification to regulate."[32] In other words, the Commission's first priority should be to ensure that its regulation

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29 Given the significant expense associated with buildout of CMRS spectrum, see Cellular Telecommunications Industry Association's Petition for Forbearance from Commercial Mobile Radio Services Number Portability Obligations, *Memorandum Opinion and Order*, 14 FCC Rcd 3092, ¶ 25 (1999) (Commission forbore from wireless local number portability requirements until November 2002 so that carriers could devote their resources to network buildout), it is hard to imagine that carriers would be willing to reach contractual agreements (assuming that such agreements did not implicate the 45 MHz cap) to utilize a portion of another carrier's spectrum assets to introduce advanced 3G services.

30 See Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself, 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition").

31 See Order at ¶ 62.

32 Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC

not serve to diminish consumer welfare by impairing innovative new service offerings. In a competitive sector such as CMRS, the Commission's presumption should be against all regulation except that which is demonstrated to be the least restrictive means available in those circumstances where limited regulatory intervention is essential. The Commission must resist the temptation to believe that "the risks of free market competition are greater than the benefits."[33] To do otherwise will risk establishing a "misguided framework for addressing competition and deregulation questions that will perpetuate regulation, institutionalize government intrusion in markets, and inhibit the full blossoming of competition all in direct contravention to Congress' wishes."[34]

Rcd 16857 (1998), Dissenting Statement of Commissioner Harold W. Furchtgott-Roth at 16934 (emphasis in original) ("PCIA Forbearance Order and NPRM").

[33] PCIA Forbearance Order and NPRM, Separate Statement of Commissioner Michael Powell, Dissenting in Part at 16944.

[34] Id. at 16941.

V. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission reconsider its decision and adopt the proposals made herein to forbear from the 45 MHz CMRS spectrum cap.

Respectfully submitted,

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